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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN LAGUNAS CUEVAS, Defendant and Appellant.	G040476 (Consol. with G040478) (Super. Ct. Nos. 07CF0172 and 07CF0899) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed as modified.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

In case No. 07CF0899, a jury found defendant Adrian Lagunas Cuevas guilty of possession of cocaine base for sale (Health & Saf. Code, § 11351.5) with a finding the offense was committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b); all further references are to this code unless otherwise specified) (count 1) and participation in a criminal street gang (§ 186.22, subd. (a)) (count 2). Defendant admitted an on-bail enhancement. In case No. 07CF0172, defendant pleaded guilty to possession of a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1, subd. (a)) with a finding the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)) (count 1) and participation in a criminal street gang (§ 186.22, subd. (a)) (count 2). The court dismissed a third count, possession of a firearm by a felon (§ 12021, subd. (a)(1)). The court sentenced defendant to nine years in state prison in case no. 07CF0899 and five years concurrent in case No. 07CF0172.

In his appeal defendant advances the following arguments (we assume all pertaining to case No. 07CF0899): (1) Count 2 and the gang enhancement on count 1 must be reversed because there was no evidence the predicate offenses were committed by members of defendant's gang; (2) count 1 must be reversed because of the absence of a unanimity instruction; and (3) the sentence on count 2 must be stayed under section 654. We disagree with all but the last of these arguments and affirm the judgment as modified.

To the extent the facts of the case are relevant to these issues, we refer to them in our discussion.

DISCUSSION

1. The evidence supports a finding the predicate offenses were commited by a criminal street gang.

The record discloses defendant was a member of Townsend Street gang. He argues the prosecution failed to provide adequate evidence to support a finding that members of the Townsend Street gang committed the predicate offenses.

Section 186.22, subdivision (f) provides: "As used in this chapter, 'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."

Section 186.22, subdivision (e) states: "As used in this chapter, 'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons: [followed by a listing of 33 specified crimes]."

In *People v. Gardeley* (1996) 14 Cal.4th 605, 610, fn. omitted, our Supreme Court stated: "Under the act, 'pattern of criminal gang activity' means that gang members have, within a certain time frame, committed or attempted to commit 'two or more' of specified criminal offenses (so-called 'predicate offenses'). [Citation.]" And in *People v. Fiu* (2008) 165 Cal.App.4th 360, 387, the court stated: "In order to qualify as a criminal street gang, the gang's members must 'engage in or have engaged in a pattern of

criminal gang activity.'" Focusing on the word "members" in these cases, defendant argues there was insufficient evidence the predicate offenses were committed by "members of the gang" because there was no such showing; they did admit to being "active participants" in Townsend Street.

Subdivision (e) of section 186.22 does not use the term "members." And we cannot draw a meaningful distinction between the phrases "gang members" and "active participants" in the gang. We hardly assume that criminal street gangs maintain a roster of active members or charge periodic dues in a manner we associate, for example, with service clubs such as The Rotary Club or The Exchange Club. Although our Supreme Court used the term "members" in *People v. Gardeley*, it did not attempt to define this term and there is no suggestion that a certain level of formality is required before one becomes a member of a criminal street gang. Although many gangs may use some antisocial proceedings to "elevate" persons to membership, there obviously is no legal requirement for such proceedings. And section 186.22, subdivision (f) expressly provides that the organization may be "formal or informal." We therefore believe it inappropriate to interpret section 186.22, subdivision (e) so as to require some formal induction ceremony before a person who "actively participates" in the gang may provide the predicate offense to qualify the group as a criminal street gang. Whether the predicate offenses were committed by formal "members" or "active participants" in the gang, the requirements of section 186.22, subdivision (e) were satisfied.

2. A unanimity instruction was not required.

Before defendant's arrest, the probation officer saw him and a companion separating drugs, "little white rocks." A search discovered a cigarette box with several pieces of rock cocaine, several other pieces on the table, one "rocklike substance" in defendant's hand, and the same substance on the chair where defendant had been seated. Defendant contends the court was required to give a unanimity instruction because some

jurors may have concluded that he possessed the contraband contained in the cigarette box, while others might have based their verdict on the material found on his chair.

As the Attorney General points out, *People v. Champion* (1995) 9 Cal.4th 879, overruled on another ground in *People v. Combs* (2004) 34 Cal.4th 821, 860, makes it clear that no such instruction was required. The case involved successive rapes and our Supreme Court stated: "[O]nce a juror determined that defendant Ross committed one of the two rapes, it is inconceivable that the juror would not also conclude that Ross also committed the second rape of the same victim." (*Id*. at p. 932.) And in *People v. Beardslee* (1991) 53 Cal.3d 68, the court noted, "'A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.' [Citations.] '[W]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury's understanding of the case.' [Citations.]" (*Id*. at p. 93.) The same situation prevails here.

3. The sentence on count 2, participation in a criminal street gang, must be stayed.

Section 654 prohibits multiple punishments for a single act or indivisible course of conduct. And "[i]f all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) We agree with defendant that his conviction was based on a single act, incident to a single objective: the sale of illegal drugs. (See generally *People v. Vu* (2006) 143 Cal.App.4th 1009, 1032-1034.) Therefore the concurrent sentence imposed under count 2 for participation in a criminal street gang must be stayed.

DISPOSITION

The judgment is affirmed, except that the sentence in case No. 07CF0899 is modified to provide that the concurrent sentence imposed under count 2 is instead stayed. The clerk of the Superior Court is ordered to modify the abstract of judgment accordingly and to forward a copy of the modified abstract to the Department of Corrections and Rehabilitation. The judgment in case no. 07CF0172 is affirmed.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.